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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-483

JULIAN J. DONALD,
Petitioner

v.

CLARENCE JONES,
Sheriff of Dallas County, Texas,
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

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v.

CLARENCE JONES,
Sheriff of Dallas County, Texas,
Respondent

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

Petitioner, Julian J. Donald, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in the above entitled case on June 14, 1971. (Rehearing denied July 22.)

OPINIONS BELOW

The opinion of the Texas Court of Criminal Appeals, printed as Appendix A hereto, is reported at 453 S.W. 2d 825. The United States District Court's Findings

of Fact and Conclusions of Law and its Final Order Denying Relief And Granting Certificate Of Probable Cause are printed as Appendix B hereto. That Order is not reported; the Findings and Conclusions are reported at 318 F.Supp. 563. The opinion of the United States Court of Appeals, not yet reported, is printed as Appendix C.

JURISDICTION

The judgment of the Court of Appeals was dated and entered June 14, 1971. Timely petition for rehearing was filed June 28, 1971 and was denied by the Court of Appeals on July 22, 1971. (Appendix D) The jurisdiction of the Supreme Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the proscription in Article I, Section 10, of the United States Constitution that no State shall pass any ex post facto law was contravened where the Texas courts entirely deprived petitioner of his Texas statutory right to elect to have a jury determine punishment, by applying to his case a recently amended statute which shifted the last opportunity for making that jury election backward in time to his pretrial hearing which had occurred before the statute was amended, and by denying petitioner's mid-trial request which was timely under the law in effect up until just before the trial began.

2. Whether the prohibition of Article I, Section 10, of the Constitution toward ex post facto laws applies to procedural laws which materially alter the situation of the accused to his disadvantage, as well as to substantive laws.

3. Whether the only evidence of previous conviction of an offense of the same nature, which was an essential element of the State's case on enhancement of the sentence, may be supplied by documents which were not exemplified as required by 28 U.S.SC. 1738 for records of a judicial proceeding of another State.

CONSTITUTIONAL PROVISIONS AND STATUTES

The constitutional provisions and statutes which this case involves are:

(1) Article I, Section 10, of the Constitution of the United States provides, "No State shall . . . pass any Bill of Attainder, ex post facto Law or Law impairing the Obligation of Contracts . . ." Also, Article I, Section 9 of the Constitution of the United States provides the same restraint upon the power of the general government: "No Bill of Attainder or ex post facto Law shall be passed."

(2) Texas Code of Criminal Procedure

(a) In Chapter Twenty-six, which is entitled "Arraignment":

Art. 26.11 Indictment read

The name of the accused having been called, if no suggestion, such as is spoken of in the four preceding Articles, be made, or being made is diosposed of as before directed, the indictment shall be read, and the defendant asked whether he is guilty or not, as therein charged.

Art. 26.12 Plea of not guilty entered

If the defendant answers that he is not guilty, such plea shall be entered upon the minutes of the court; if he refuses to answer, the plea of not guilty shall in like manner be entered.

(b) In Chapter Twenty-seven, "The Pleading "The Pleading In Criminal Actions":

Art. 27.02 Defendant's pleadings

On the part of the defendant, the following are the only pleadings:

1. The motion to set aside the indictment or information;

2. A special plea setting forth one or more facts as cause why the defendant ought not to be tried upon the accusation presented against him;

3. An exception to the indictment or information for some matter of form or substance;

4. A plea of guilty;

5. A plea of not guilty;

6. A plea of nolo contendere. The legal effect of

such plea shall be the same as that of a plea of guilty, but the plea may not be used against the defendant as an admission in any civil suit based upon or growing out of the act upon which the criminal prosecution is based;

7. Defendant's application for probation, if any; and

8. Defendant's election, if any, to have the jury assess the punishment if he is found guilty. (Section 8 was added by the August 27, 1967 amendment involved in this case.)

(c) In Chapter Twenty-eight, "Motions, Pleadings and Exceptions":

Article 28.01. Pre-trial

Sec. 1. The court may set any criminal case for a pre-trial hearing before it is set for trial upon its merits, and direct the defendant and his attorney, if any of record, and the State's attorney, to appear before the court at the time and place stated in the court's order for a conference and hearing. The defendant must be present at the arraignment, and his presence is required during any pre-trial proceeding. The pre-trial hearing shall be to determine any of the following matters:

(1) Arraignment of the defendant, if such be necessary; and appointment of counsel to represent the defendant, if such be necessary;

(2) Pleadings of the defendant;

(Subsections (3) through (8) involve pretrial consideration of the indictment, continuance, evidence, venue and discovery.)

Sec. 2. When a criminal case is set for such pre-trial hearing, the defendant shall have five days after notice of setting in which to file his motions, pleadings and exceptions; and any such preminary matters not raised and filed within the time allowed will not thereafter be allowed to be raised or filed, except by permission of the court for good cause shown. The record made at such pre-trial hearing, the rulings of the court and the exceptions and objections thereto shall become a part of the trial record of the case upon its merits.

(Sec. 3, added in 1967, provides the manner of giving notice of such setting.)

(d) In Chapter Thirty-six, "The Trial Before The Jury":

Article 36.01 Order of proceeding in trial

A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. The indictment or information shall be read to the jury by the attorney prosecuting. When prior convictions are alleged for purposes of enhancement only and are not jurisdictional, that portion of the indictment or information reciting such convictions shall not be read until the hearing on punishment is held as provided in Article 37.07.

2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.

(Sections 3 through 7 list other stages of the trial.)

8. In the event of a finding of guilty, the trial shall then proceed as set forth in Article 37.07.

(e) In Chapter Thirty-seven, "The Verdict":

(When petitioner was indicted, and when he was arraigned and his plea was entered at the time of his pretrial hearing, the January 1, 1966 version of Article 37.07 was in effect, as follows:)

Art. 37.07 Verdict must be general; separate hearing on proper punishment

1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find, it must say in its verdict that the allegations in such pleas are true or untrue. If the plea is not guilty, it must find that the defendant is either guilty or not guilty.

2. Alternate procedure.

(a) In felony cases less than capital and in capital cases where the State has made it known that it will not seek the death penalty, and where the plea is not guilty, the judge shall, before the argument begins, first submit to the jury the issue as to the guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon

the punishment to be imposed; provided, however, that in the charge which submits the issue of guilt or innocence there shall be included instructions showing the jury the punishment provided by law for each offense submitted.

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

(Additional provisions of Art. 37.07, not pertinent here, are omitted.)

(After petitioner entered his plea on September 26, 1966, the Texas legislature convened in January of 1967, and on August 28, 1967 the following amended version of Article 37.07 became effective:)

Art. 37.07 Verdict must be general; separate hearing on proper punishment

1. The verdict in every criminal action must be general. When there are special pleas on which a jury is to find they must say in their verdict that the alle-

gations in such pleas are true or untrue. If the plea is not guilty, they must find that the defendant is either guilty or not guilty, and, except as provided in Section 2, they shall assess the punishment in all cases where the same is not absolutely fixed by law to some particular penalty.

2. Alternate procedure

(a) In all criminal cases, other than misdemeanor cases of which the justice court or corporation court has jurisdiction, which are tried before a jury on a plea of not guilty, the judge shall, before argument begins, first submit to the jury the issue of guilt or innocence of the defendant of the offense or offenses charged, without authorizing the jury to pass upon the punishment to be imposed.

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided, however, that (1) in capital cases where the state has made it known in writing prior to trial that it will seek the death penalty, (2) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial began, and (3) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

(Additional provisions of Art. 37.07, not pertinent here, are omitted.)

(3) 28 U.S.C. 1738

§ 1738. State and Territorial statutes and judicial proceedings; full faith and credit

The Acts of the legislature of any State, Territory, or Possession of the United States, or copies thereof, shall be authenticated by affixing the seal of such State, Territory or Possession thereto.

The records and judicial proceedings of any court of any such State, Terirtory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court anexed, if a seal exists, together with a certificase of a judge of the court that the said attestation is in proper form.

Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken. June 25, 1948, c. 646, 62 Stat. 947.

STATEMENT OF THE CASE

On the date of the alleged offense, August 12, 1965,

Article 693 of the 1925 Texas Code of Criminal Procedure provided a single, general verdict by which a jury determined both guilt, or innocence, and punishment, if any. January 1, 1966 was the effective date of the new Code of Criminal Procedure. Article 37.07 thereof established the bifurcated trial in Texas. Under that statute the defendant was entitled to wait until the conclusion of the first part of the trial and the return of a finding of guilty before he made his election between jury and judge for the assessment of punishment. That was the status of the law when defendant Donald was indicted on May 9, 1966 and when he was arraigned and entered his plea in open court at the pre-trial hearing on September 26, 1966.

August 28, 1967 was the effective date of an amendment to Article 37.07, which required that an election that punishment be assessed by the jury be made "at the time he (the defendant) enters his plea in open court."

The Code provision that defendant's plea "shall be entered" is in Article 26.12 which sets forth the procedure at arraignment, which occurs at the pretrial hearing. Article 28.01. The 1967 amendment expressly added the election to have the jury assess punishment to the Article 27.02 list of defendant's pleadings, which are determined at the pre-trial hearing. Art. 28.01.*

Petitioner's trial began on October 23, 1967, where-

*The Code does not provide for arraignment at the trial. The indictment is simply read to the jury and defendant's counsel states defendant's plea. Art. 36.01.

upon defendant Donald was "arraigned" again on the first paragraph of the indictment and pled not guilty.

On October 26, 1967, while the jury was deliberating on guilt or innocence, defendant filed his request that the jury assess the punishment. The trial judge endorsed said request: "This was not filed until the trial had been held and the jury was deliberating." The jury then returned its verdict of guilty and was discharged. The defendant was then "arraigned" on the second paragraph of the indictment and pleaded that the allegations therein were not true.

The trial judge admitted into evidence State's Exhibits 7 through 11 (See Appendix in Court of Appeals), which were offered on the issue of enhancement of the sentence and which were not exemplified in the manner provided by 28 U.S.C. 1738. Petitioner's counsel made timely objection that these exhibits were not exemplified.

Punishment was enhanced under Texas Penal Code Article 62 (concerning previous conviction for offense of the same nature), and the trial judge fixed the maximum sentence, ten years. On appeal from this conviction the Texas Court of Criminal Appeals affirmed. Donald pursued and exhausted his Texas post conviction remedy (Texas Code of Criminal Procedure Art. 11.07, *Ex Parte Young*, 418 S.W.2d 824) and then immediate filed the habeas corpus application which is the subject of this petition.

The United States District Court denied relief but granted a certificate of probable cause and bail. Sub-

stantially all of the pertinent facts are covered by the Findings of Fact made by the United States District Court (App. B), and neither party questions those Findings.

REASONS FOR GRANTING THE WRIT

The opinion of the Court of Appeals in this case deserves the attention of the Supreme Court because it holds that "the prohibition of Article I, Section 10, of the United States Constitution toward ex post facto laws applies only to changes in substantive law." This holding, on a federal question, is in conflict with applicable decisions of the Supreme Court.

A substantial right which the law gave the defendant at the time to which his guilt relates cannot be taken away from him by ex post facto legislation simply because, in a general sense, the legislation in question may be said to regulate procedure. *Kring v. Missouri*, 107 U.S. 221, 27 L.Ed. 507, 2 S. Ct. 443, referring to "the law with regard to bail, to indictments, to grand juries, to the trial jury" as involving substantial rights which may not be changed after the offense is committed. *Thompson v. Utah*, 170 U.S. 343, 42 L.ed. 1061, 18 S. Ct. 620; *Beazell v. Ohio*, 269 U.S. 167, 70 L.ed. 216, 45 S. Ct. 68. An accused is protected against subsequent legislation which materially alters the situation to his disadvantage, *Duncan v. Missouri*, 152 U.S. 377, 38 L.ed. 485, 14 S. Ct. 570; and whether the subsequent statute "is more onerous within the meaning of the constitutional prohibition"

is a federal question. *Lindsey v. Washington*, 301 U.S. 397, 81 L.ed. 1182.

The amended provisions of the Texas Code of Criminal Procedure which became effective after petitioner was indicted clearly moved the time for his election to have the jury assess punishment back to the pretrial hearing, when he was arraigned and entered his plea. That had occurred before the Code was so amended, and the result of this sequence of events was to deprive petitioner of his previously existing right to elect to have a jury assess punishment.

This petition presents the question whether any character of procedural protection of less than constitutional dimension is subject to the ex post facto provision of the Constitution, because from the viewpoint of the accused the right to elect to have a jury assess punishment must surely be among the most valuable procedural rights not guaranteed by the Constitution.* The Court recently mentioned this question in *Williams v. Florida*, 399 U.S. 78, 26 L.ed. 2d 446, 90 S. Ct. 1893, observing that the reversal of the conviction in *Thompson v. Utah* may have been justified "wholy apart from the Sixth Amendment", because the statute of the new State of Utah reduced the defendant's jury to eight jurors instead of twelve as provided by the territorial statute in effect at the time of the crime. (399 U.S. p. 90, footnote 26)

The present case would provide an effective vehicle

*The question whether procedures protected by the Bill of Rights are also protected by the ex post facto provision of the Constitution seems rather academic and probably would not justify certiorari.

for consideration and determination by the Supreme Court of the nature and extent of this fundamental right which was twice guaranteed by the Constitution itself, long before the Fourteenth Amendment.

Moreover, this question of ex post facto deprivation of a right to a jury on punishment arises here in a case in which the maximum sentence was assessed on the basis of records of another State which were not exemplified in the manner required by federal law.

This nation is passing through an era of explosive change of procedural law in federal and state criminal cases. Cases such as the present one will inevitably result from such change, and Supreme Court consideration of the problem at this time would be in the best interests of the administration of justice.

CONCLUSION

For the foregoing reasons this petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion In Texas Court of Criminal Appeals

JULIAN J. DONALD, Appellant

No. 42,412 v. —Appeal from Dallas County

THE STATE OF TEXAS, Appellee

OPINION

The offense is theft by false pretext, with a prior conviction for an offense of the same nature alleged for enhancement; the punishment, ten years.

His first ground of error is that he was allegedly denied compulsory process of witnesses at his pre-trial hearing. What he actually seemed to want was the records of the banks described in vague language in part as follows:

> "And bring with you any 'Stop Payment' orders issued on said cashier's check together with your records of whether the payment was successfully stopped or not. And bring with you your records showing whether or not any financial loss, at all, and, if so, how much, was sustained on these cashier's checks."

The trial court found that "subpoenas were and are vague and indefinite for this hearing," and we agree. In Sonderup v. State, 418 S. W. 2d 807, we held that the trial court did not err in declining to require the

production of "all statements, documents and evidence now in the possession of police officers or the District Attorney of Nueces County."

We overrule his contention, not supported by any authority, that he was denied the effective assistance of counsel, because the court set the pre-trial hearing in seven cases against appellant for the same day. The hearing was set more than five (5) days prior to the trial and complies with Article 28.01, Section 2, V.A.C.C.P. Appellant's contention that Judge A. D. Bowie was disqualified is moot because Judge Penn Jackson heard this case in the absence of Judge Bowie who was ill. At the pre-trial hearing, the Honorable A. D. Jim Bowie testified that he as Assistant District Attorney had never heard of appellant and did not participate in any investigation of the cases against the defendant nor did he present the matter to the grand jury. Muro v. State, 387 S. W. 2d 674, is the authority for the rule that, where a judge had been an assistant district attorney "at the time of the offense but had no recollection of working on the case," he was not disqualified.

Appellant next contends that District Attorney Henry Wade and his assistants were disqualified to prosecute this case because the District Attorney was on the Board of Directors of the First Citizens Bank of Dallas. We need not pass upon the question of disqualification because there is no evidence in this case that such bank was in any way connected with the transactions involved in this case.

The motion for change of venue was insufficient

since it was not sworn to in accordance with the terms of Article 31.03, V.A.C.C.P., and nothing is presented for review.

Appellant's challenge to the array was not supported by affidavits as required by Article 35. 07, V.A.C.C.P., and nothing is presented for review.

Appellant moved for the trial court to suppress the testimony of Jane Savage because she was an accomplice witness. Nash v. Illinois, 389 U.S. 906, 19 L. Ed. 2d 223, 88 S. Ct. 222, and Napue v. Illinois, 360 U. S. 264, 3 L. Ed. 2d 1217, 79 S. Ct. 1173, which are relied upon by appellant, can have no application to the case at bar. The court's charge on the question of Jane Savage being an accomplice is substantially that approved by this Court in Angle v. State, 306 S. W. 2d 718.

Appellant's motion to quash the indictment was on the ground that the prosecution was based upon a written instrument and such instrument was not set out in the indictment. The holding of this Court in Mounts v. State, 317 S.W. 2d 212, clearly disposes of this contention.

Another motion to quash the indictment is predicated upon the contention that the witnesses whose names were listed on the back of the indictment were not called to testify before the Grand Jury. The grounds set forth in the motion were not those authorized by Article 27. 03, V.A.C.C.P. Furthermore, the Supreme Court of the United States in Castillo v. U. S., 350 U. S. 359, 100 L. Ed. 397, 76 S. Ct. 406, put this

question to rest when it held that an indictment might be based upon hearsay.

Appellant's motion to produce a certain identifiable exhibit was granted by the court. On the day of the trial, although apparently tardy, the State complied with this order. We do not find that appellant was harmed by such delay under the facts of this case. Nor do we find any error in the trial court's failure to grant his motion for continuance filed on the day the trial began.

Appellant's contention that the evidence was insufficient to support the jury's finding that appellant appropriated any money to his own benefit requires a discussion of some of the facts. Appellant, who according to this record was the alter ego of a number of "companies," none bearing his name, employed one Jane Savage to work in his office and had her open an account in the American Bank and Trust Company of Dallas in the name of "Cal-Mex Station 66" and authorized her, alone, to sign checks. On the day in question, he instructed her to write a check on the American Bank and Trust Company account in the sum of $9,640.19 payable to the order of the Hillcrest State Bank of Dallas. This check was exchanged at the Hillcrest State Bank for a cashier's check with appellant's name as purchaser, payable to the Dallas County State Bank. This cashier's check was exchanged by appellant at the Dallas County State Bank for nine cashier's checks, five of which were made to the order of Cal-Mex Leasing and Distributing Company (another of appellant's companies) in the sum of $1722.41 each, and he then secured Jane Savage's

endorsement thereon as signer for Cal-Mex Leasing and Distributing Company.

The original $9,647.17 check on the American Bank and Trust Company was disohnored because of insufficient funds. The above facts clearly establish the elements of the offense of theft by false pretext from the Hillcrest State Bank.

The fact that appellant, through one of his attorneys, later made partial restitution will not prevent prosecution for the original theft, 16 Tex. Jur. 2d, Section 90, p. 207.

Appellant contends that the Hillcrest State Bank through its agent, Eddie Smith, consented to the taking of the sum involved. He bases this contention on the testimony of Jane Savage who stated that on July 19, 1966, prior to the issuance of the check in question on August 12, 1966, she had had a telephone conversation with one Eddie Smith at the Hillcrest State Bank in connection with some checks to be cashed that day. She informed Smith that the Cax-Mex Station 66 account did not have sufficient funds in said bank to cover the checks she was then writing, and Smith admitted that he knew such to be the case. Jane Savage's testimony stated that at the time she wrote the checks in question, as well as the checks she was drawing on July nineteenth, appellant assured her that he would have the money in the American Bank and Trust Company in time to cover the Hillcrest State Bank cashier's check. This testimony plus the fact that an examination of the daily balance sheets for the Cal-Mex Station 66 account at the American Bank and

Trust Company from July twentieth through August sixteenth would indicate that such account was not overdrawn. For this reason, Eddie Smith was not charged with the knowledge that the August twelfth, check would be dishonored when it was present. If the checks he had issued on July nineteenth had been paid, as it would appear from this record they had been, then no question of acquiescence of appellant's illegal act on the part of Eddie Smith would be raised.[1] All the items shown that were introduced in evidence are before this Court.

The trial court covered any question of Eddie Smith's participation in appellant's crime when he charged the jury as follows:

> ". . . . You are further instructed that if you find from the evidence or if you have a reasonable doubt that at the time State's Exhibit No. 1 was used to purchase a cashier's check, being State's Exhibit No. 3, that Hillcrest State Bank of University Park or the person acting for said bank in the issuance of the said cashier's check did not believe that State's Exhibit No. 1 would be paid when presented to American Bank and Trust Company in the due course of business, then in such event you will find the defendant not guilty."

This we believe is a fair discussion of the grounds of error that the appellant seriously asserts.

Finding the evidence sufficient to support the conviction and finding no reversible error, the judgment

---

[1]Eddie Smith was shown to be dead at the time of this trial.

is affirmed.

Morrison, Judge

(Delivered December 10, 1969)

A True Copy

Attest:

Glenn Haynes, Clerk
Court of Criminal Appeals of Texas
By: Glenn Haynes

CLERKS OFFICE, COURT OF CRIMINAL
APPEALS OF TEXAS
AUSTIN, TEXAS

I, GLENN HAYNES, Clerk of the Court of Criminal Appeals of Texas, do hereby certify that in Cause No. 42,412 styled:

JULIAN J. DONALD, Appellant

vs.

STATE OF TEXAS, Appellee

judgment of the Criminal District Court of Dallas County, Texas, was affirmed on December 10, 1969. Appellant's Motion for Rehearing was overruled, without written opinion April 29, 1970, and on May 26, 1970 mandate issued.

THEREFORE, with the overruling of Appellant's Motion for Rehearing, this cause was disposed of by this Court on April 29, 1970, appellant having ex-

hausted all remedies in this, The Court of Criminal Appeals of Texas and said judgment has now become final on the docket of this Court.

WITNESS my hand and Seal of said Court, at office, in Austin, Texas, this the 5th day of June, A.D., 1970.

GLENN HAYNES, CLERK of the Court
of Criminal Appeals of Texas

SEAL

APPENDIX B

DISTRICT COURT FINDINGS OF FACT AND CONCLUSIONS OF LAW

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF TEXAS

DALLAS DIVISION

JULIAN J. DONALD

v.

BILL DECKER, SHERIFF OF DALLAS COUNTY TEXAS

No. CA-3-3891A

In the Matter of the Application of Julian J. Donald For a Writ of Habeas Corpus

---

Findings of Fact

I.

Procedural Matters

1. On the 4th day of June, 1970, when the petition for habeas corpus was filed in this case, and thereafter until June 12, 1970 when petitioner was enlarged on recognizance pursuant to order of this Court, the petitioner was in the custody of the respondent, Bill Decker, Sheriff of Dallas County, Texas, and petitioner was detained in custody by respondent at the Dallas County Jail in Dallas, Texas.

2. The respondent held the petitioner in custody at such time pursuant to a Capias issued on June 1st, 1970 by the District Clerk of Dallas County, Texas. Said Capias was issued pursuant to the Mandate of the Court of Criminal Appeals of the State of Texas, which Mandate was issued by the Clerk of said Court on May 26th, 1970. Said Mandate was issued pursuant to the determination and order of the Texas Court of Criminal Appeals on April 29th, 1970 overruling the Motion for Rehearing of appellant Julian J. Donald and affirming the October 26th, 1967 judgment, and the December 14, 1967 sentence of the Criminal District Court of Dallas County, Texas, by which the petitioner was convicted of the offense of theft of corporeal personal property of the value of $50.00 or over, by false pretext, and by which punishment was assessed at ten years imprisonment.

3. The petitioner urged that the writ be granted for the reasons stated in his application for the writ.

4. Petitioner has exhausted the remedies available in the courts of the State of Texas, in that petitioner duly and timely appealed to the Texas Court of Criminal Appeals from his conviction and petitioner properly pursued and exhausted the Texas past conviction remedy provided by Article 11.07, Texas Code of Criminal Procedure, as construed by Ex Parte Young, 418 S. W. 2d 824. All of the grounds stated above were presented and urged in the State Courts.

5. No prior petitions for habeas corpus have been filed in any Federal Court.

II.

FINDINGS OF FACT AS TO PETITIONER'S GROUNDS 1, 2, 3 and 4

A. Petitioner was charged by indictment returned May 9, 1966, with having committed the offense of felony theft on August 12, 1965; and the second paragraph of the indictment alleged a previous conviction of an offense of the same nature (obtaining money by false and fraudulent representations), in the State of New Mexico on February 24, 1957.

B. On September 23, 1966, before the pre-trial hearing, defendant filed his sworn application for probation, which application stated that he had never before been convicted of a felony in this or any other state, except as to a felony conviction in the State of New Mexico for which he had received a pardon.

C. On September 26, 1966 a pre-trial hearing was held in the case to determine preliminary motions and for arraignment of the defendant and for his plea. On that date the defendant was arraigned and he pled Not Guilty.

D. On October 23, 1967, the trial began and the State Court record contains the following:

1. The docket sheet on page 8 of the State Court record contains the following entry dated Oct. 23, 1967:

> "Deft arraigned. Plead not guilty—Indictment read, deft plead not guilty". This entry was initialed by the Judge presiding over the trial, Judge Penn Jackson.

2. On page 1 of the State Court Statement of Facts, which is page 244 of the State Court record, the following appears:

> ". . . the Defendant having been previously arraigned and pled, 'Not Guilty,' the (first paragraph of the) Indictment was read aloud to the Jury, the Defendant again pled 'Not Guilty' ".

3. On page 117 of the State Court Statement of Facts, which is page 362 of the State Court record, the following appears:

> "Whereupon the Defendant was arraigned by Mr. Stauffer reading the (first paragraph of the) Indictment, the Defendant pled 'Not Guilty', then

the (first paragraph of the) Indictment was read aloud to the Jury by Mr. Stauffer, and the Defendant again pled 'Not Guilty' ".

E. On October 26, 1967 while the jury was still out deliberating on the Petitioner's guilty or innocence, the Petitioner filed his request that the jury assess the punishment in the event the defendant was found guilty, and such request was endorsed by the trial judge; "This was not filed until the trial had been held and the jury was deliberating. Penn J. Jackson J."

F. The jury returned its verdict of guilty on October 26, 1967 and was discharged. The second paragraph of the indictment was then read and the trial judge proceeded to hear the Petitioner's plea that the allegations in the second paragraph were not true, and after hearing the evidence decided the issue against the Petitioner and fixed his penalty at the maximum, ten years in the Texas Department of Corrections.

III.

FINDINGS OF FACT AS TO PETITIONER'S GROUND 5

A. During the hearing on the second paragraph of the indictment, concerning enhancement, heard by the Judge without the jury, State's Exhibits 7 through 11 (Vol. II of Statement of Facts) were offered and admitted into evidence over timely objection by defendant's counsel that the proper foundation had not

been laid and that they were not exemplified. No other exhibit concerning New Mexico proceedings was offered in evidence.

IV.

FINDINGS OF FACT AS TO PETITIONER'S GROUND 6

A. During 1963, 1964 and 1965, until October 1, 1965, A. D. "Jim" Bowie was First Assistant Criminal District Attorney of Dallas County, Texas.

B. Criminal District Court No. 5 of Dallas County, Texas came into existence on October 4, 1965 and the said A. D. "Jim" Bowie was duly appointed as, and was sworn in as, the first judge of said court.

C. On May 9, 1966 the indictment in this case, State District Court No. C-66-1806-I, was presented in Criminal District Court No. 2 of Dallas County, Texas and was then transferred to and received by Criminal District Court No. 5.

D. At the pre-trial hearing, at which he presided, Judge Bowie testified that prior to assuming the bench of Criminal District Court No. 5 he had never heard of the Petitioner and did not participate in the investigation, grand jury hearing, trial preparation or anything whatsoever to do with this case, and had no knowledge that this case was pending or that a complaint was filed or presented to a grand jury.

E. Judge Bowie presided over the pre-trial hearing in this case on September 26, 1966, and at such hear-

ing overruled the motion to disqualify himself, presided when the defendant was arraigned and pled not guilty, overruled defendant's Motion for Change of Venue, overruled defendant's motion to dispose of the pending cases made obsolete by the pending indictments, overruled defendant's application for subpoena of witnesses for the pre-trial hearing, overruled defendant's Motion to Quash the Indictment; and on September 29, 1966 Judge Bowie overruled defendant's First Application for Continuance, and qualified defendant's Bill of Exception No. 1.

F. The actual trial of this case, which started on October 23, 1967, was presided over by Judge Penn Jackson, sitting for Judge Bowie. On said date, before the jury was selected, Judge Jackson ruled that the Court would take no further action on defendant's Motion to Produce, and also overruled motions to disqualify the District Attorney, to quash the indictment, to restrict State's Argument, to continue the trial, to suppress the testimony of Jane Savage and to quash the jury panel.

CONCLUSIONS OF LAW

I.

The Court finds that as a matter of law the Petitioner was not denied the right or opportunity to have his punishment assessed by the jury.

II.

The Court finds that Art. 37.07 of the Texas Code of Criminal Procedure is not an ex post facto law which deprived the Petitioner the right to have the jury set his punishment.

III.

The Court finds that subdivision 3 of sub-section B of Section 2 of Article 37.07 of the Texas Code of Criminal Procedure as enacted in 1967 which provides that the Defendant may elect to have a jury assess his punishment when he enters his plea in open court to mean that he may file such election at the time the indictment is presented to the jury and the Defendant pleads to them, the jury. The Court further finds that the time of entering his plea in open court as stated in such section does not mean such time as the arraignment of the Defendant but as above stated, the time the indictment is presented to the jury and the Defendant enters his plea at such time.

IV.

The Court finds that the Petitioner was not deprived of the right or opportunity to elect to have the jury assess his punishment in this case even if subdivision 3 of sub-section B of Section 2 of Article 37.07 C.C.P. which provides that a defendant may elect to have the jury assess his punishment at the time he enters

his plea in open court means he must file his election at the time of his arraignment and not the time of his plea before the jury because the Petitioner in this case was again arraigned on October 23, 1967, after the jury was selected and just before the indictment was presented to the jury, thus giving him the opportunity and right to file his election to have the jury assess his punishment.

V.

The Court finds that the Petitioner was not deprived of the right under Article 37.07 to have the punishment assessed by the jury in this case wherein the jury could recommend probation. The Court finds that the jury could not recommend probation in this case because in both of the Petitioner's applications for probation he stated under oath that he had a prior felony conviction which, under said Article 37.07, would prevent the granting of probation to the Petitioner by the jury.

VI.

The Court finds that the petitioner was not deprived of the right to have the question of probation submitted to the jury under Article 37.07 C.C.P., for the reason as stated above, that the petitioner had a prior felony conviction which would prevent the granting of probation by a jury.

VII.

The Court further finds as a matter of law that the

trial judge correctly refused Petitioner's election to have the jury assess his punishment because the same was filed too late under the Code of Criminal Procedure in effect at the time of Petitioner's trial.

VIII.

The Court finds that Article 37.07 C.C.P., as amended in 1967 after Petitioner's indictment but before his trial, is not an ex post facto law as to the Petitioner because such law as amended is but a law of procedure of the State of Texas, leaving untouched the substantive law under which Petitioner was indicted.

IX.

The Court finds that a person has no vested right in any partial remedy or procedure and cannot insist on the application to the trial of his case with any other then existing rules of procedure. *Gibson v. State of Mississippi*, 152 U.S. 565, 40 L.Ed. 1075, 16 S. Ct. 904.

X.

The Court finds that statutes making changes in the remedy or procedure are always within the discretion of the law making power of the state and as long as they do not deprive the accused of any substantial right or conflict with the provisions of the Constitution they are not ex post facto laws. Thus a change in the mode of trial, without changing the na-

ture of the offense, or its constituent elements, or the nature or amount of evidence necessary to prove the charge, or altering the punishment, is not an ex post facto law. *Beazell v. Ohio*, 269 U.S. 167, 70 L.Ed. 216, 45 S. Ct. 68; *Thomas v. Utah*, 170 U.S. 43, 42 L.Ed. 1061, 18 S.Ct. 620; *Duncan v. Missouri*, 152 U.S. 377, 38 L.Ed. 485, 14 S.Ct. 570.

XI.

The Court finds as a matter of law that Petitioner's Ground No. 5 dealing with the introduction at his trial of a prior felony conviction out of New Mexico deals with a rule of evidence of the State of Texas and thus does not present a Federal question under a Federal Writ of Habeas Corpus.

XII.

The Court finds as a matter of law that Judge A. D. "Jim" Bowie, who presided over Petitioner's pre-trial hearing in this case, was not disqualified to preside over such hearing because he had been first assistant District Attorney in the past; and the fact that Judge Bowie did preside over such pre-trial hearing under the facts of this case did not deprive Petitioner of a fair and impartial trial.

XIII.

The Court finds as a matter of law that the Peti-

tioner's Application for Writ of Habeas Corpus is totally without merit and should be and is hereby denied.

October 7, 1970

S/ W. M. Taylor, Jr.
UNITED STATES DISTRICT JUDGE

Final Order Denying Relief And Granting Certificate of Probable Cause

(Number and Title Omitted)

Filed: July 6, 1970

The application of Julian J. Dor.ald for discharge from custody was filed on June 4, 1970, and on June 5, 1970 the Court entered an order setting petitioner's application for bail for hearing on June 8, 1970, and at said hearing on June 8, 1970 the respondent appeared with the petitioner in custody, and at said hearing the Court received all evidence which either party desired to offer on petitioner's application for habeas corpus or on his application for bail, and the Court having read and considered petitioner's application and the exhibit attached thereto and having considered the evidence oeffred at said hearing and having considered the briefs subsequently submitted by the petitioner and by the respondent, and it appearing to

the Court that the Court does have jurisdiction to entertain, and should entertain, this application for habeas corpus relief, and that the relief sought by the petitioner should be denied;

It is therefore ordered that the application of Julian J. Donald for discharge from custody shall be, and it is hereby, denied.

The undersigned judge who renders such order certifies that there exists probable cause for appeal.

And it appearing to the Court that pending review of said decision refusing to release petitioner, the petitioner has been enlarged by the United States Commissioner for this Division upon recognizance in the amount of $20,000.00, with surety, as authorized and directed by the Order entered by this Court in this action on June 12, 1970, said action of the Commissioner is hereby approved and confirmed.

Dated this 6th day of July, 1970.

s/ W. M. Taylor, Jr.
United States District Judge

APPENDIX C

(1) Opinion of U. S. Court of Appeals

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30389

JULIAN J. DONALD,

Petitioner-Appellant,

versus

SHERIFF CLARENCE JONES OF DALLAS COUNTY, TEXAS,

Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(June 14, 1971)

Before SKELTON,* Judge, and MORGAN and CLARK, Circuit Judges.

SKELTON, Judge: This is an appeal from an order of the United States District Court for the Northern District of Texas denying habeas corpus relief and granting a certificate of probable cause. Petitioner, Julian J. Donald, filed a petition for habeas corpus on June 4, 1970, alleging, *inter alia*, that he was deprived of the right to a jury trial on the punishment of a bifurcated trial, because of ex post facto application of Article 37.07 of the Texas Code of Criminal Procedure.

The root of the problem in this case stems from a change in Texas law with regard to the jury's assessing a defendant's punishment. At the time of the offense on August 12, 1965, Article 693 of the 1925 Texas Code of Criminal Procedure was in effect. It provided for a single, general verdict by which a jury determined both the defendant's guilt and punishment. However, a new Texas Code of Criminal Procedure became effective on January 1, 1966, and was thus operative at the time of petitioner's indictment and arraignment. Article 37.07[1] of this new Code estab-

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*Honorable Byron Skelton, U. S. Court of Claims, Washington, D.C., sitting by designation as a member of this panel.

[1]Article 37.07 2(b) states in pertinent part:

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment

lished the bifurcated trial in Texas by which the defendant could elect between the judge and the jury as to whom he wanted to assess his punishment if found guilty. The defendant could wait until the conclusion of the first part of the trial and the return of a finding of guilty by the jury before he made this election. However, on August 28, 1967, after the indictment and arraignment of the petitioner, but prior to his trial, Article 37.07 2(b) was amended, so as to require that the above-mentioned election be made "at the time he enters his plea in open court."[2] This provision was in effect at the time of Donald's trial. Thus, the question arises as to what the term "plea in open court" means in relation to when the election is to be

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applicable to the offense charged where the same is not absolutely fixed by law to some particular penalty except when the defendant, upon the return of a finding of guilty, requests that the punishment be assessed by the same jury. In the event the defendant elects to have the jury fix the punishment in cases where the punishment is fixed by law, the court shall instruct the jury that if they find the defendant is the same person who was convicted in the prior conviction or convictions alleged for enhancement, they should set his punishment as prescribed by law.

[2]Article 3707 2(b)

(b) If a finding of guilty is returned, it shall then be the responsibility of the judge to assess the punishment applicable to the offense; provided however, that (1) in capital cases where the state has made it known in writing prior to trial that it will seek the death penalty, (2) in any criminal action where the jury may recommend probation and the defendant filed his sworn motion for probation before the trial began, and (3) in other cases where the defendant so elects in writing at the time he enters his plea in open court, the punishment shall be assessed by the same jury. If a finding of guilty is returned, the defendant may, with the consent of the attorney for the state, change his election of one who assesses the punishment.

made. The facts leading up to appellant's petition are as follows.

Petitioner Donald was indicted on May 9, 1966, for felony theft by false pretext alleged to have been committed on August 12, 1965. The indictment also alleged a previous conviction of an offense of the same nature (obtaining money by false and fraudulent representations in New Mexico on February 24, 1957) under the Texas recidivist statute for the purpose on enhancement of punishment. The pre-trial hearing was held on September 26, 1966, at which time Donald was arraigned and pleaded not guilty. Prior to this, on September 23, 1966, petitioner filed his sworn application for probation, stating essentially that he had never been convicted of a felony except in New Mexico for which he had received a pardon. More than a year later on October 23, 1967, Donald's trial began. As stated, this was subsequent to the effective date of amended Article 37.07. After the jury was selected, Donald was arraigned again and he pleaded not guilty in open court. The first paragraph of the indictment was then read to the jury and the defendant again pleaded not guilty in open court. Then, on October 26, 1967, while the jury was deliberating on the guilt or innocence of the defendant, Donald filed his request that the jury assess his punishment in the event he be found guilty, which motion was overruled by the trial judge as being filed too late. Under the original Article 37.07, this request would have been timely, but under amended Article 37.07 which was in effect at the time of trial, the request had to be made when defendant entered his plea in open court. The jury returned its verdict of guilty

and was discharged, because under Article 37.07, upon a finding of guilty by the jury, it is the judge's responsibility to assess punishment unless the defendant had theretofore timely requested that the jury assess his punishment. The second paragraph of the indictment was then read alleging a prior felony conviction in New Mexico for a prior offense of the same nature, and, the trial judge, after hearing the evidence decided the issue of enhancement against the defendant and fixed his penalty at the maximum of ten years confinement in the penitentiary.

Petitioner Donald contends that the application of Article 37.07 as amended was ex post facto in nature because it deprived him of the opportunity to make his jury election and thus have a jury assess his punishment. This contention is based on the premise that "plea in open court" means at the time of arraignment and since the time of arraignment had passed when the new law became effective, defendant was denied an opportunity to make his election. However, we find, as did the United States District Judge, that Donald still had the opportunity to make an election, because we interpret "open court" as used in Article 37.07 2(b)3 to connote the time the defendant makes his plea to the indictment before the jury in "open court." Also, it should be noted here that even if, as defendant contends, "open court" meant at the time of arraignment, he would still not have been denied the opportunity to elect to have the jury assess his punishment because he was arraigned again and made his plea in open court at the start of the trial which was *after* the amendment became effective.

Petitioner next argues that even if he were not deprived of the opportunity to make his jury election by the 1967 amendment to Article 37.07, the application of the amended statute nevertheless deprived him of a substantial right and material advantage available to him under the prior law. However, the prohibition of Article I, Section 10 of the United States Constitution toward ex post facto laws applies only to changes in substantive law. *Beazel v. Ohio*, 269 U.S. 167, 46 S.Ct. 68, 70 L.Ed. 216 (1925); *Thompson v. Utah*, 170 U.S. 343, 18 S.Ct. 620, 42 L.Ed. 1061 (1898). A person has no vested right in any partial remedy or procedure and can not insist on the application to the trial of his case of any rules of procedure other than those existing at the time of trial. *Gibson v. Mississippi*, 162 U.S. 565, 16 S.Ct. 904, 40 L.Ed. 1075 (1896). The legislature may prescribe at its discretion different modes of procedure or different remedies as long as they do not deprive the accused of a substantial right, such as changing the nature of the offense, or its constituent elements. *Beazell v. Ohio, supra; Thompson v. Utah, supra; Duncan v. Missouri*, 152 U.S. 377, 14 S.Ct. 570, 38 L.Ed. 485 (1894). We find that the 1967 amendment to Article 37.07 was a procedural change in the law that did not deprive the defendant of a substantial right. It did not take away the defendant's right to elect to have a jury assess his punishment, but merely changed the time at which the defendant could elect to exercise this still existing right.

Defendant cites two Georgia Supreme Court cases in support of his proposition that he was deprived of a substantial right, *Camp v. State*, 200 S.E. 126 (Ga.

1938); *Hurt v. State*, 199 S.E. 801 (Ga. 1938). However, in these two cases the defendants had the absolute right to have a jury assess their punishment under the indeterminate sentence law in effect when the criminal acts were committed. Before their trials, such law was amended so that only the judge could set punishment. The George Supreme Court held that this was an ex post facto law as to these two defendants because it deprived them of a substantial preexisting right. But, these cases are distinguishable in that in the instant case, the right to have the jury assess punishment was not taken away. The time of election was merely changed and it is well established that a change in the mode of trial without a change in a substantial right is not vitiated as being an ex post facto law. Furthermore, the Georgia statute is different in that it was mandatory that the jury assess punishment. Here there is a choice. Defendant claims only two alleged advantages that he would be really deprived of under the new law: (1) hear the evidence and observe its appeal to the judge and jury, and (2) make the election after observing the jurors when they return a guilty verdict. We find these are not substantial advantages guaranteed to appellant by the U. S. Constitution. Thus, it was proper for the trial court to apply the change in the procedural law of Article 37.07 as amended in 1967 to Donald's case.

Petitioner also contends that he was entitled to a jury on punishment under 37.07 2(b) (2)[3] relating to probation. Such contention is without merit. Under article 41.12 3(a) of the Texas Code of Criminal

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[3]See footnote 2, *supra*.

Procedure,[4] a defendant must file a sworn motive for probation before trial, stating that he has never been convicted of a felony in this or any other state. This is one of the prerequisites for having the jury recommend probation. In other words, the defendant must take this sworn statement before the jury "may recommend probation" under Article 37.07 2(b) (2). Thus, the requirement of 42.12 3(a) must be met before the provision of 37.07 2(b) can be invoked. Here the defendant Donald admitted in his sworn statement that he had been previously convicted of a felony in New Mexico. Thus, the requirements of Article 42.12 were not met, and for that reason, this never became a case where the jury could recommend probation under 37.07. Therefore, the trial judge was correct when he did not submit the issue of probation to the jury.

Furthermore, defendant claims his felony conviction should not be considered because he was granted a pardon for such felony conviction in New Mexico. However, the pardon does not vitiate the effect of de-

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[4]Article 42.12 3(a) states in pertinent part:

> Sec. 3a. Where there is a conviction in any court of this State and the punishment assessed by the jury shall not exceed ten years, the jury may recommend probation upon written sworn motion made therefor by the defendant, filed before the trial begins. When the trial is to a jury, and the defendant has no counsel, the court shall inform the defendant of his right to make such motion, and the court shall appoint counsel to prepare and present same, if desired by the defendant. In no case shall probation be recommended by the jury except when the sworn motion and proof shall show, and the jury shall find in their verdict that the defendant has never before been convicted of a felony in this or any other State. * * *

fendant's felony conviction for the purpose of enhancement. *Jones v. State*, 147 S.W.2d 508 (Tex. Crim. App. 1941), *Logan v. State*, 448 S.W.2d 462 (Tex. Crim. App. 1969). The reason for this was stated in *Gurleski v. United States*, 5 Cir. 1968, 405 F.2d 253. "A pardon for any other reason than subsequent proof of innocence does not obliterate the defendant's previous transgressions."

Defendant next contends that the records that the state introduced to prove his prior felony conviction were not properly exemplified as required by 28 U.S.C. 1738 (1964).[5] The United States District Judge correctly found that the introduction of evidence of a prior felony conviction in New Mexico deals with a rule of evidence of the State of Texas and thus does not present a Federal question under a Federal Writ of Habeas Corpus. Furthermore, 28 U.S.C. 1738 (1964) was enacted to implement the full, faith, and credit clause of the United States Constitution by providing a way of exemplifying the records of judicial proceedings held in one state so that such records

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[5]28 U.S.C. 1738 (1964) states in pertinent part:

* * * *

> The records and judicial proceedings of any court of any such State, Territory or Possession, or copies thereof, shall be proved or admitted in other courts within the United States and its Territories and Possessions by the attestation of the clerk and seal of the court annexed, if a seal exists, together with a certificate of a judge of the court that the said attestation is in proper form.
>
> Such Acts, records, and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken.

would be admissible in later judicial proceedings held in another state. Thus, this statute merely means full, faith, and credit *must* be given if certain requirements are met. However, evidence of judicial proceedings may be admissible if less is shown than the statute requires when it conforms to the rules of evidence of the state where the trial is being held. Furthermore,, any stringent rules as to what is required to prove a prior conviction or identity of the convicted person in another state is somewhat obviated by defendant's own admission that he was in fact previously convicted of a felony in that state. The judicial commitment order which ordered the appellant to be imprisoned in New Mexico for obtaining money by means of false and fraudulent representations and statements was exemplified by an attestation by the Acting Warden of the New Mexico Penitentiary that such documents were true and correct copies of the original records on file in his office, and also by a certificate of the Secretary of the State of New Mexico that such attestation by the Acting Warden was in proper order. This, coupled with defendant's admission, is sufficient evidence to support the enhancement finding.

Finally, defendant claims that he was deprived of a fair and impartial trial because the judge, Judge Bowie, who presided at his pretrial hearing was First Assistant District Attorney at the time of the offense in question. However, Judge Bowie had never heard of appellant prior to assuming the bench nor had he participated in the investigation of this case. In fact, defendant was not indicted on his offense until over eight months after Judge Bowie took the bench. Furthermore, Judge Bowie did not sit at the actual trial

of this case. Under these circumstances petitioner was not deprived of a fair trial. *Muro v. State*, 387 S.W.2d 674 (Tex. Crim. App. 1965). In fact, defendant did not insist on this point at oral argument.

Because of the above reasons, we conclude that the District Court correctly denied petitioner's application for writ of habeas corpus and its judgment should be and the same is hereby

AFFIRMED.

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1970

No. 30389

D. C. Docket No. CA-3-3891

JULIAN J. DONALD,
Petitioner-Appellant,

versus

SHERIFF CLARENCE JONES OF
DALLAS COUNTY, TEXAS,
Respondent-Appellee

Appeal from the United States District Court for the

Northern District of Texas

Before SKELTON,* Judge, and MORGAN and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that petitioner-appellant pay to respondent-appellee, the costs on appeal to be taxed by the Clerk of this Court.

June 14, 1971

Issued As Mandate:

*Honorable Byron Skelton, U. S. Court of Claims, Washington, D. C., sitting by designation as a member of this panel.

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 30389

JULIAN J. DONALD,
Petitioner-Appellant,

versus

SHERIFF CLARENCE JONES OF DALLAS COUNTY, TEXAS,
Respondent-Appellee.

Appeal from the United States District Court for the Northern District of Texas

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(July 22, 1971)

ON PETITION FOR REHEARING

Before SKELTON,* Judge, and MORGAN and CLARK, Circuit Judges

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby DENIED.